



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05419/2018

THE IMMIGRATION ACTS

Heard at Birmingham Employment Tribunal
on 11 September 2019

Decision & Reasons Promulgated
on 18 September 2019

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SRZ
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Fraczyk instructed by Staffordshire North CAB
For the Respondent: Mr D Mills Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Juss promulgated on the 23 July 2018 in which the Judge dismissed the appeal on all grounds.

Background

2. It was accepted before the Judge the appellant is a national of Iran of Kurdish ethnicity.
3. At [15] the Judge writes:
 15. The essential criticism made of the Appellant, with respect to his claim of smuggling alcohol, is that he was (i) vague with respect to the smuggling route, and (ii) lacked credibility when he said the mules were able to transport the alcohol. The Skeleton Argument observes that he “was giving a rough recollection of precise measurements in which scope for degree of (limited) accuracy existed” (at para 6(iii)). Whereas this may be so, three things, on the lower standard, do not lack credibility. First, the Appellant said he resorted to alcohol smuggling in order to provide for his ailing mother so she could have the necessary medicines. Second, the description of the ‘smuggling route’ was tolerably clear and credible once it was remembered that he was referring to ‘Nokan’ and not to ‘Dokan’. Third, the SSHD’s scepticism of alcohol being smuggled is dispelled by evidence produced that in the document, “*Meeting the Human Mules of Iraq*” which shows how contraband goods are smuggled into Iraq. Accordingly, I am satisfied that he was engaged in alcohol smuggling. This engaged the Smuggling CPIN on corporal punishment (para 5.3.2). I am also satisfied that a raid took place on his store which exposed him to a risk that led to his having to be moved out of the area.
4. The Judge was not satisfied the appellant was involved with the PJAK for the reasons set out at [16 – 17]. When assessing risk to the appellant in light of the findings the Judge writes at [18 – 20]:
 18. The question then is whether the return of the Appellant to Iran exposes him to a risk of ill-treatment or persecution. I am not satisfied that it does. I have taken account of the case of SSH and HR (illegal exit: failed asylum seekers) Iran CG [2016] UKUT 308 at [34] where it was stated that it was not been suggested that an individual-based risk on return on the sole basis of being Kurdish but it was agreed that being Kurdish was relevant to how a returnee will be treated by the authorities. It was noted that the operational guidance note referred to the government disproportionately targeting minority groups including Kurds for arbitrary arrest, prolonged detention and physical abuse, but it was also stated that no examples had been provided of ill-treatment of returnees with no relevant adverse interest factors other than their Kurdish ethnicity. The Upper Tribunal concluded that the evidence did not show risk of ill-treatment such returnees, although they accepted that it might be an exasperating factor of a returnee otherwise of interest.
 19. Having found that the Appellant is not a refugee because he had not established a well-founded fear of persecution, by analogy, I find that the Appellant cannot qualify for humanitarian protection either.
 20. I must consider the Appellant’s human rights claim. However, as I have found that the Appellant’s have not established a well-founded fear of persecution, by analogy, I find that the claim does not engage Article 3 of the Human Rights Convention either.
5. The appellant sought permission to appeal asserting the Judge erred by failing to take into account properly or at all material consideration namely the

particular risk posed to an Iranian Kurd who had been caught smuggling alcohol, and erred in failing to give adequate reasons and arriving at irrational conclusions on the facts for the reasons set out in the application of 1 August 2018.

6. Permission to appeal was granted by another judge of the First-Tier Tribunal, the operative part of the grant being in the following terms:
 3. The grounds content failure adequately to address the argued risk to the Kurdish Appellant arising from his smuggling activities and failure properly to take into account the Respondent's CPIN in this respect - which the Judge at paragraph 15 except it was engaged. The relative brevity of the judge's reasoning in the absence at paragraph 18 of any mention of smuggling in the context of risk, renders the grounds arguable.

Error of law

7. The Judge accepted the appellant was involved in smuggling alcohol, that the Iranian authorities raided the secret store where the alcohol was kept exposing the appellant to a risk that led to him leaving the area. The appellant asserts that on the basis of such findings there is a reasonable likelihood that the Iranian authorities are now aware that the appellant was smuggling alcohol.
8. As noted above it, was not disputed that the appellant is an Iranian Kurd or that those of this ethnic group are subject to discrimination and abusive conduct by the authorities even though such discrimination of itself cannot give rise to a protection claim – see HB (Kurds) Iran CG [2018] UKUT 00430.
9. The Judge finds the CPIN on corporal punishment was therefore engaged meaning that even if the appellant was not engaged in PJAK activities there was still a risk of ill-treatment.
10. The current CPIN Iran: Smuggling, August 2019, in relation to alcohol reads:

4.2 Alcohol

'Article 702- Anyone who produces or buys or sells or proposes to sell or carries or keeps alcoholic beverages or provides to a third person, shall be sentenced to six months to one year of imprisonment and up to 74 lashes and a fine five times as much as the usual (commercial) value of the aforementioned object.

'Article 703- Importing alcoholic beverages into the country shall be considered as smuggling and the importer, regardless of the amount (of the beverages), shall be sentenced to six months to five years' imprisonment and up to 74 lashes and a fine ten times as much as the usual (commercial) value of the aforementioned object. This crime can be tried in the General Courts.

'Note 1- In respect to articles 702 and 703, when the discovered alcoholic beverages are more than twenty liters, the vehicle used for its transport, if its owner is aware of the matter, shall be confiscated in favor of the government; otherwise the offender shall be sentenced (to a fine) equal to the value of the vehicle. Tools and equipments used for producing or facilitating the crimes mentioned in the said articles, as well as the money gained through the transactions, shall be confiscated in favor of the government.

'Note 2- When civil servants or employees of governmental companies or companies or institutes dependant to government, councils, municipalities or Islamic revolutionary bodies,

and basically all the three powers and also members of armed forces and public service officials, commit, or participate, or aid and abet in the crimes mentioned in articles 702 and 703, in addition to the punishments provided, they shall be sentenced to one to five years' temporary suspension from civil service.

'Note 3- The court, under no circumstances, shall suspend the execution of the punishment provided in articles 702 and 703.'

11. It is not disputed that corporal punishment contravenes article 3 ECHR – see *Tyrer v United Kingdom* (Application no. 5856/72). Lashes in an Iranian prison would meet the minimum level of severity required.
12. Mr Mills in his submissions argued it was not clear whether the Judge had actually found the appellant faced a real risk on return as a result of the discovery of the alcohol especially in light of the finding at [17] relating to the PJAK materials, although he accepted that to follow such a line of argument it would have been necessary to read into the findings inferences that had not been expressly stated.
13. The difficulty with this submission on behalf of the respondent is the Judge clearly states in the final sentence of [15] “I am also satisfied that the raid took place on his store which exposed him to a risk that led to his having to be moved out of the area”. There is therefore a clear finding by the Judge to the lower standard applicable in appeals of this nature that the appellant will face a real risk from the authorities in Iran as a result of the alcohol having been found which the appellant claimed to have smuggled in, a fact accepted by the Judge too.
14. There is merit in the appellant’s submission that in light of the Judge’s own findings and the treatment of those found smuggling alcohol on return to Iran the appellant faces a real risk sufficient to engage an entitlement to a grant of international protection. A lot of the discussion at the hearing revolved around the nature of that protection.
15. On behalf of the appellant it is argued he is entitled to be recognised as a refugee placing reliance upon the decision of HB, the head note of which reads:
 - (1) *SSH and HR (illegal exit: failed asylum seeker) Iran CG [2016] UKUT 308 (IAC) remains valid country guidance in terms of the country guidance offered in the headnote. For the avoidance of doubt, that decision is not authority for any proposition in relation to the risk on return for refused Kurdish asylum-seekers on account of their Kurdish ethnicity alone.*
 - (2) *Kurds in Iran face discrimination. However, the evidence does not support a contention that such discrimination is, in general, at such a level as to amount to persecution or Article 3 ill-treatment.*
 - (3) *Since 2016 the Iranian authorities have become increasingly suspicious of, and sensitive to, Kurdish political activity. Those of Kurdish ethnicity are thus regarded with even greater suspicion than hitherto and are reasonably likely to be subjected to heightened scrutiny on return to Iran.*

- (4) *However, the mere fact of being a returnee of Kurdish ethnicity with or without a valid passport, and even if combined with illegal exit, does not create a risk of persecution or Article 3 ill-treatment.*
- (5) *Kurdish ethnicity is nevertheless a risk factor which, when combined with other factors, may create a real risk of persecution or Article 3 ill-treatment. Being a risk factor it means that Kurdish ethnicity is a factor of particular significance when assessing risk. Those "other factors" will include the matters identified in paragraphs (6)-(9) below.*
- (6) *A period of residence in the KRI by a Kurdish returnee is reasonably likely to result in additional questioning by the authorities on return. However, this is a factor that will be highly fact-specific and the degree of interest that such residence will excite will depend, non-exhaustively, on matters such as the length of residence in the KRI, what the person concerned was doing there and why they left.*
- (7) *Kurds involved in Kurdish political groups or activity are at risk of arrest, prolonged detention and physical abuse by the Iranian authorities. Even Kurds expressing peaceful dissent or who speak out about Kurdish rights also face a real risk of persecution or Article 3 ill-treatment.*
- (8) *Activities that can be perceived to be political by the Iranian authorities include social welfare and charitable activities on behalf of Kurds. Indeed, involvement with any organised activity on behalf of or in support of Kurds can be perceived as political and thus involve a risk of adverse attention by the Iranian authorities with the consequent risk of persecution or Article 3 ill-treatment.*
- (9) *Even 'low-level' political activity, or activity that is perceived to be political, such as, by way of example only, mere possession of leaflets espousing or supporting Kurdish rights, if discovered, involves the same risk of persecution or Article 3 ill-treatment. Each case however, depends on its own facts and an assessment will need to be made as to the nature of the material possessed and how it would be likely to be viewed by the Iranian authorities in the context of the foregoing guidance.*
- (10) *The Iranian authorities demonstrate what could be described as a 'hair-trigger' approach to those suspected of or perceived to be involved in Kurdish political activities or support for Kurdish rights. By 'hair-trigger' it means that the threshold for suspicion is low and the reaction of the authorities is reasonably likely to be extreme.*
16. It is accepted Kurdish ethnicity is capable for forming a Particular Social Group, but the case law clearly shows that discrimination experienced as such will not amount to persecution or be sufficient to engage article 3.
17. The appellant's case is based upon the consequences of a conviction for alcohol smuggling but it was not made out before the Judge or today that any sentence the appellant will receive will be sufficient to amount to persecution in that it might be increased disproportionately as a result of his ethnicity as compared to somebody who is not a Kurd.
18. It is also the case that the Judge's finding that the appellant's claim to have been involved with the PJAk was not believed. There is no credible evidence that the

appellant has been involved in opposition political activities of a type that may give rise to a real risk on return as a result of either an actual or imputed adverse opinion to the Iranian regime.

19. I do not find it made out that the appellant has established an entitlement to be recognised as a refugee. I do, however, accept the Judge erred in law in dismissing the appeal on all grounds and substitute a decision allowing the appeal pursuant to article 3 ECHR on the basis the appellant has established that any sentence he will receive on return to Iran as a result of his known activities and objectively well-founded real risk arising therefrom, which will include lashes, is sufficient to engage article 3 ECHR.

Decision

20. **The First-Tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remake the decision as follows. This appeal is allowed on article 3 ECHR grounds only.**

Anonymity.

21. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in light of the Presidential Guidance Note, para 5(iv) as requested by the appellant’s representative.

Signed.....
Upper Tribunal Judge Hanson

Dated the 11 September 2019